BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUANITA L. BILLUPS	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,626
NATIONAL ENVELOPE CORPORATION	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

The parties requested review of the Award dated September 20, 1996, entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on February 18, 1997, in Kansas City, Kansas.

APPEARANCES

Ryan T. Linville of Kansas City, Missouri, appeared for the claimant. Stephanie Warmund of Overland Park, Kansas, appeared for the respondent and its insurance carrier. Eugene C. Riling of Lawrence, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 45 percent work disability. However, the Judge denied claimant's request for additional temporary total disability benefits and the request for payment of certain medical expenses. Claimant requested the Appeals Board to review the following issues:

(1) Is claimant entitled to any additional temporary total disability benefits?

(2) Did the Administrative Law Judge determine the proper percentage of claimant's permanent partial general disability?

(3) Is claimant entitled to an award for the medical expense she incurred for her back treatment?

The respondent, its insurance carrier, and the Workers Compensation Fund requested the Appeals Board to review the following issues:

(4) What is the nature and extent of claimant's injury and disability?

(5) Did claimant provide respondent with timely notice of accident?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) Claimant injured her back while working for the respondent on November 6, 1993. The accidental injury occurred while claimant was attempting to move a 55-gallon barrel of ink.

(2) Claimant notified respondent of her back injury on Tuesday, November 9, 1993, when she telephoned John Thoele, one of her supervisors. During that telephone conversation, claimant advised she needed to seek medical treatment for her back for an incident that occurred at work the preceding Saturday. Respondent did not instruct or direct claimant to seek treatment from a designated health care provider.

(3) Without being instructed otherwise, claimant sought medical treatment on her own. Between the date of accident and claimant's last day of work for respondent on January 3, 1994, claimant worked approximately two weeks. Shortly after the accident, claimant came under treatment by Dr. Robert M. Drisko, II, who eventually performed laminotomies and bilateral foraminotomies at the L4-L5 and L5-S1 intervertebral levels on January 12, 1994. Claimant was temporarily and totally disabled from engaging in substantial and gainful employment from the time she left work on January 3, 1994, until Dr. Drisko released her to return to work in February 1995.

(4) The parties have stipulated that claimant's average weekly wage on the date of accident was $460.65 consisting of $366.93 in base wages and $93 in additional compensation items.

(5) The November 1993 accident aggravated a preexisting condition of spinal stenosis. From the time she was a teenager, claimant had intermittently experienced aches and pains in her back and legs. In 1992 claimant hurt her back while lifting boxes and missed several days of work. After that lifting incident, claimant sought and obtained a transfer to the darkroom because of her back symptoms. The transfer caused claimant a reduction in pay.

(6) As indicated above, claimant underwent back surgery on January 12, 1994. When claimant testified at the preliminary hearing held on August 25, 1994, she continued to be off work as Dr. Drisko had not at that point in time released her. As a result of the August 1994 preliminary hearing, the Administrative Law Judge ordered the respondent and its insurance carrier to pay temporary total disability benefits commencing the date of the hearing. At the time of the regular hearing, respondent and its insurance carrier had paid claimant 24 weeks of temporary total disability benefits at the weekly rate of $233.34 for a total of $5,600.16.

(7) Claimant now has a 15 percent whole body functional impairment, 8 percent of which preexisted the November 1993 accident. As a result of the November 1993 back injury, claimant should now observe the following work restrictions and limitations: avoid repetitive bending, pushing, pulling, or twisting activities; avoid sustained or awkward postures of the lumbar spine; and be allowed to alternate between sitting and standing as needed.

(8) Because claimant was off work for more than a year, respondent formally terminated her employment in January 1995. From March through October 1995, claimant worked for $6 per hour for a friend on a crew which cleaned up newly constructed houses. While on the cleanup crew, claimant usually worked only 20 to 25 hours per week but sometimes worked 40 hours depending upon the availability of work. That is the only work which claimant has performed since being terminated by respondent.

(9) Since October 1995, claimant has not sought work other than making informal inquiries with a friend and other cleanup crews. Claimant cannot recall her friend's last name or the names of the companies where she allegedly made inquiry. For the six-month period before she last testified in March 1996, claimant did not apply for any employment.

(10) Claimant has obtained a ninth-grade education. She has neither a GED nor vocational training. Claimant is unable to read and write. For the 20-year period before her November 1993 back injury, claimant worked for various printing companies as a printer but did some work in the folding, darkroom, and ink departments. The job tasks

claimant performed for respondent and the other printing companies were essentially the same.

(11) Because of the November 1993 back injury, claimant has lost the ability to perform 75 percent of the job tasks which she performed in the 15-year period before the accident. That finding is based upon the testimony and opinions of Dr. P. Brent Koprivica who evaluated claimant in March 1995.

(12) Despite her back injury, claimant retains the ability to earn $240 per week as demonstrated by her ability to work on the construction site clean-up crew.

CONCLUSIONS OF LAW

(1) Did claimant provide respondent with timely notice of accident?

K.S.A. 44-520 provides in pertinent part:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

As indicated in the findings above, claimant notified a supervisor of her work-related injury on Tuesday, November 9, 1993. Because notice was given within ten days of the accident, it was timely.

(2) Is claimant entitled to an award for the medical expense incurred for her back treatment?

An employer is required to provide the services of a health care provider after learning of an employee's work-related injury. K.S.A. 44-510(b) provides:

> If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

Because respondent did not appoint an authorized health care provider after claimant notified the company of her work-related back injury, the medical expense the claimant thereafter obtained is treated as authorized medical care. Therefore, claimant is

entitled to an award for the medical expense she incurred after notifying respondent of her back injury on November 9, 1993. Such award includes the services of Dr. Sue Pearson and Dr. Drisko and any of their referrals which relate to the treatment of claimant's back injury.

The legislature has determined questions regarding the reasonableness of medical care should be resolved in the utilization and peer review procedure set forth in K.S.A. 44-510(a)(6) through (13). The Appeals Board takes official notice that the Director of the Division of Workers Compensation has hired staff and has implemented procedures to handle such reviews. However, the Court of Appeals in Beisel v. Boeing Co., 23 Kan. App. 2d 572, 932 P.2d 1050 (1997), held that until the Director develops and publishes utilization and peer review procedures, the "statute is in a state of limbo and will remain quiescent and ineffective." According to Beisel, until such time as utilization and peer review procedures are published, the fact finder is to determine the issues regarding medical bills as provided by K.S.A. 44-534a, as amended.

Based upon the testimony of Dr. Koprivica, the Appeals Board finds the medical bills claimant incurred for her back treatment through Drs. Pearson, Drisko, and their referrals, were reasonable and necessary. Respondent and its insurance carrier relied upon the testimony of Dr. David J. Clymer to support their argument that claimant's medical expense was too high. However, neither the respondent nor its insurance carrier designated which medical expenses were being questioned. At page 33 of his deposition, Dr. Clymer testified as follows:

> I guess I would say $30,000 is somewhat higher than I might expect in general. I note that there seems to be a number of therapy bills here and things beyond the hospitalization and surgery and laboratory, et cetera. Again I really can't tell you whether $30,000 is an accurate total of all these. I would say in someone who has had a back surgery, hospitalization, follow-up care and a good deal of physical therapy, that a total bill in the range of $20- to $30,000 would not be surprising to me.

The Appeals Board notes Dr. Clymer also admitted he did not know the duration of claimant's hospitalization or the specifics regarding either the treatment provided claimant before surgery or her physical therapy after surgery.

When considering the entire evidentiary record, the Appeals Board finds claimant's medical expenses for her back treatment to be reasonable and necessary. Therefore, those medical bills presented at regular hearing should be paid by respondent and its insurance carrier as authorized medical.

(3) Is claimant entitled to additional temporary total disability benefits for the period from January 4, 1994, through August 25, 1994?

As indicated above, claimant last worked for the respondent on January 3, 1994, and underwent back surgery on January 12, 1994. The Administrative Law Judge ordered payment of temporary total disability benefits after the preliminary hearing held on August 25, 1994. At the time of the preliminary hearing, claimant's treating physician had not yet released her to return to work.

The Appeals Board finds claimant was either awaiting surgery or recovering from surgery from January 4 through August 25, 1994, and, therefore, finds claimant was temporarily and totally disabled from engaging in any employment during that period. That conclusion is based upon both claimant's testimony and Dr. Koprivica's opinion that claimant was unable to work during the period in question.

In addition to the 24 weeks of temporary total disability benefits previously paid, claimant is entitled to an additional award of temporary total disability benefits for the period from January 4, 1994, through August 25, 1994, a period of 33.43 weeks, as indicated in the award of benefits below.

(4) What is the nature and extent of claimant's disability?

The Appeals Board finds claimant has a 62 percent work disability as the result of her November 1993 back injury. However, because of the 8 percent preexisting whole body functional impairment, claimant's permanent partial disability benefits should be paid based upon a 54 percent disability rating.

Because hers is an "unscheduled" injury, the computation of claimant's permanent partial general disability is governed by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Also, see K.S.A. 44-501(c) which requires an award of compensation to be reduced by the amount of preexisting functional impairment.

Claimant has a 75 percent loss of ability to perform the work tasks she performed in the 15-year period before the November 1993 accident. That conclusion is based upon the opinion of Dr. Koprivica. The Appeals Board has carefully considered the arguments to exclude Dr. Koprivica's opinion, but finds his task loss analysis credible and persuasive. No other physician provided a different opinion and no vocational expert testified to establish that the task list the doctor considered was somehow flawed.

At the time of regular hearing claimant was unemployed and, thus, had an actual 100 percent difference in her pre- and post-injury average weekly wage. However, before the 100 percent wage difference can be utilized in the wage loss prong of the permanent partial disability formula, a worker must establish he or she has made a good faith effort to find appropriate employment or a wage will be imputed. *See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997).

As indicated above, claimant has not sought employment since October 1995 other than making a few informal inquiries. The Appeals Board finds claimant has not exercised a good faith attempt to find appropriate employment and, therefore, the post-injury wage of $240 per week should be imputed to calculate the permanent partial general disability. Comparing $240 to the pre-injury stipulated wage of $460.65 yields a 48 percent difference.

As required by K.S.A. 44-510e, the 75 percent loss of work tasks is averaged with the 48 percent wage difference which creates a 62 percent permanent partial general disability. As required by K.S.A. 44-501(c), the 62 percent rating is reduced by the 8 percent preexisting whole body functional impairment which yields a 54 percent rating for which claimant should receive permanent partial general disability benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated September 20, 1996, entered by Administrative Law Judge Robert H. Foerschler should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Juanita L. Billups, and against the respondent, National Envelope Corporation, and its insurance carrier, Liberty Mutual Insurance Company, and the Workers Compensation Fund for an accidental injury which occurred November 6, 1993, and based upon an average weekly wage of $460.65 for 57.43 weeks of temporary total disability compensation at the rate of $307.12 per week or $17,637.90, followed by 201.19 weeks at the rate of $307.12 per week or $61,789.47, for a 54% permanent partial general disability, making a total award of $79,427.37.

As of January 20, 1998, there is due and owing claimant 57.43 weeks of temporary total disability compensation at the rate of $307.12 per week or $17,637.90, followed by 162 weeks of permanent partial compensation at the rate of $307.12 per week in the sum of $49,753.44 for a total of $67,391.34, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $12,036.03 is to be paid for 39.19 weeks at the rate of $307.12 per week, until fully paid or further order of the Director.

The claimant is entitled to an award for payment of the medical expense she incurred for her back treatment following November 9, 1993, as represented by the medical bills introduced at regular hearing.

Claimant is entitled to an award of unauthorized medical expense not to exceed the statutory maximum of $500. Claimant also may apply for future medical benefits upon proper application to the Director and notice to all parties.

As stipulated by the parties, the Workers Compensation Fund is to pay 60% of the award and costs associated with this proceeding.

The Appeals Board adopts as its own the Administrative Law Judge's designation of deposition transcript expense as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Ryan T. Linville, Kansas City, MO
Stephanie Warmund, Overland Park, KS
Eugene C. Riling, Lawrence, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director